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No. 92-478

IN THE

Supreme Court of the United States

October Term, 1992

Arizona Hispanic Community Forum,

Appellant,

v.

J. Fife Symington, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Arizona

MOTION TO AFFIRM

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the district court acted within its discretion in ordering, for emergency interim use for the 1992 elections only, a state legislative redistricting plan not yet precleared by the Department of Justice where (i) the court found exigent circumstances based on the proximity of the elections and the pre-election, administrative deadlines; (ii) the U.S. Department of Justice had found that the plan "in large part" met the preclearance requirements of Section 5 of the Voting Rights Act and the court found that the plan attempted to cure the one Section 5 objection raised by the Department of Justice; and (iii) no alternative modification to cure the objection was presented to the court.

RULE 29.1 STATEMENT

Appellee Arizonans for Fair Representation, Inc. is an Arizona non-profit corporation and has no parent or subsidiary.

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MOTION TO AFFIRM

Appellees, the Arizona State House of Representatives, Governor J. Fife Symington, Secretary of State Richard D. Mahoney, Arizonans for Fair Representation, Inc., Paul Fannin, John Mawhinney, and Stan Turley, for the reasons detailed herein, move to affirm the judgment of the district court on the grounds that the judgment was correct and that this appeal raises no substantial questions on the merits.

In essence, this appeal challenges the district court's adoption of state legislative districts, on an emergency interim basis for the 1992 elections only, owing to the proximity of the upcoming elections, where the only alternative proposed by appellant was continued use of the unconstitutional, malapportioned districts drawn a decade ago. Even though the adopted districts indisputably enhanced minority electoral opportunities — and the other Hispanic parties to this proceeding do not join in this appeal — the appellant Hispanic Community Forum complains that the court authorized districts which were not precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. This contention fails to raise any substantial question: A uniform line of cases (and the Department of Justice's own

regulations) recognize that in exigent circumstances, such as where an election is imminent, a federal court may order the use of districts that do not in all respects comply with the law. And the facts of this case show that the court below properly exercised its discretion pursuant to this principle of law because: (1) when the court implemented the interim districts, the deadline for candidates to file nomination petitions for the 1992 primary elections was only six days away (June 25, 1992); (2) the U.S. Department of Justice had concluded that "in large part, the Arizona House and Senate redistricting plan meets Section 5 preclearance requirements"; (3) the plan authorized by the court attempted to cure the only objection raised by the Department of Justice; and (4) appellant failed to present any alternative to cure the objection. Given the lack of any substantial issue of law, the decision below should be summarily affirmed.

COUNTER-STATEMENT OF THE CASE

A. The Redistricting of Arizona's State Legislative Districts Following the 1990 Census

Even before the release of the 1990 decennial census, Arizona commenced the process of drawing new state legislative districts with the establishment of a Joint Select Committee on Reapportionment and Redistricting, chaired by the President of the State Senate (the "Senate") and the Speaker of the State House of Representatives (the "House"). (Senate exh. 79) During the summer of 1991, the committee held 20 hearings throughout the State, which were followed by negotiations between the Senate and House.

On February 10, 1992, the House and Senate released a proposed legislative redistricting plan and held further public hearings on the plan on February 15, 17, and 18, 1992, which resulted in further modifications. (*Id.*)

On February 20, 1992, the House and Senate passed a state legislative redistricting plan. It was signed by Governor Symington on February 28, 1992.

In contrast to the old districts, which had become seriously malapportioned, the new plan provided for substantial equality of population among districts, as required by the Fourteenth Amendment to the U.S. Constitution. (*Id.*) Moreover, although Arizona already had 6 minority senators (5 Hispanics and one American Indian) out of 30 senatorial seats, and 12 minority House members, the plan indisputably enhanced minority electoral opportunities by creating, *inter alia*, an *additional* Hispanic population majority district (district 11) and by enhancing the Hispanic population in the other districts, except for one which nonetheless remained a majority-Hispanic population district[1]. (*Id.*)[2]

On or around March 17, the Governor submitted the state legislative districts to the U.S. Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act. Arizona is one of those states covered by Section 4(b) of the Act for which preclearance is required before the districts can be enforced. 42 U.S.C. § 1973c; 28 C.F.R. § 51.1(a) & appendix. The Governor requested expedited consideration pursuant to 28 C.F.R. § 51.34 because if the full sixty-day period permitted for preclearance was utilized, *see* 42 U.S.C. § 1973c, authorization for the new districts would come less than ten days before the first day for filing candidate nomination petitions and papers on May 26, 1992. (Senate Exh. 79). Since nomination petitions must contain the signatures of qualified voters from the district

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[1] The Hispanic population in district 10 was reduced to 53.6% to enable the Hispanic population in adjacent district 11 to be increased from 40.6% to 50.1%. (Senate exh. 79, p. S2054-2055).

[2] Appellant claims that "[a]s a result of the 1992 redistricting, at least one incumbent Hispanic state senator is not seeking election because of the changes in his district" reducing Hispanic membership in the Senate from 5 of 30 seats (or 16.6%) to 4 (or 13.33%). (Jur. State., p. 3) There is absolutely no basis in the record for this allegation. Although Senators Gutierrez and Ruiz, the state senators from districts 11 and 23, respectively, have announced their retirement, there is nothing in the record to suggest that their decision was influenced by redistricting. Indeed, the redistricting enhanced the Hispanic population in Senator Ruiz's district from 53.7% to 54.5% and significantly increased the Hispanic population in Senator Gutierrez's district from 40.5% to 50.1%. (Senate Exh. 79 at S2055).

in which the candidate seeks to run, district boundaries must be fixed sufficiently before the deadline for filing nomination petitions to give candidates, particularly lesser known challengers, time to collect the qualifying number of signatures. A.R.S. §§ 16-314, 16-322A.

On April 30, 1992 — 41 days later — the State received its first communication from the Department of Justice concerning its legislative plan, requesting further information. Further information was provided on May 7, 1992, May 14, 1992, May 19, 1992, and May 20, 1992.

B. The Department of Justice's Objection

By letter dated June 10, 1992 -- 82 days after the original preclearance submission and *after* the May 26 commencement date for filing nomination petitions — the U.S. Department of Justice advised the State that "in large part, the Arizona House and Senate redistricting plan meets Section 5 preclearance requirements," but that in one area (Santa Cruz County), Hispanic voters were improperly divided among three, rather than two districts:

> In the southeastern area of the state, however, the proposed configuration of district boundary lines appears to have been drawn in such a way as to minimize Hispanic voting strength. Specifically, we refer to the considerable concentration of Hispanic population in Santa Cruz County (78% Hispanic in population), which the submitted plan divides among three legislative districts (Districts 8, 9 and 11). We are aware that alternative plans were rejected which would have avoided this fragmentation *and more fairly recognized this concentration of Hispanic voters by dividing them between two districts, thereby creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice*. [Emphasis added.]

(June 10, 1992 Letter, attached to Jur. State. at 21a-25a).

Hence, the only objection raised by the Department of Justice was that the Hispanic voters in Santa Cruz County should have been divided among two, rather than three legislative districts "thereby" creating an additional district in which Hispanic voters would have the "potential" to elect representatives of their choice.

C. The District Court Proceedings

Within eight hours of receipt of the Department's June 10 letter — and with the deadline for candidates to file their nomination petitions only 15 days away on June 25, 1992, A.R.S. §§ 16-311A, 16-314 — appellees Arizonans for Fair Representation and others filed a motion in the United States District Court for the District of Arizona, requesting an order authorizing the emergency use of the enacted state districts, modified to cure the objection interposed by the Department of Justice, for the 1992 elections.

Proceedings in the district court had, in fact, been previously commenced. On February 7, 1992, appellee Arizonans for Fair Representation and three individuals had instituted an action in the district court before a three-judge court pursuant to 28 U.S.C. § 2284, requesting that the court implement both a congressional and state legislative redistricting plan in time for the 1992 elections owing to the failure of the Legislature to pass redistricting legislation. When the House and Senate enacted their bipartisan plan for state legislative districts, the district court stayed its action with respect to the state legislative districts (pending preclearance) and proceeded to trial with respect to the congressional districts. On May 5, 1992, the district court filed a judgment adopting a congressional redistricting plan which is the subject of another appeal. *See Arizona State Senate, Hispanic Chamber of Commerce, et al. v. Arizonans for Fair Representation, Nos. 92-362 and 92-375* (U.S. August 27, 1992).[3]

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[3] Appellant incorrectly claims in its Jurisdictional Statement, p. 7, that in the congressional redistricting case, the district court "ordered into effect a permanent plan for election of Arizona's congressmen, without any finding of exigent circumstances . . . ." This contention is erroneous, as is appellant's allegation

(footnote continues)

D. S.B. 1360's Cure of the Section 5 Objection

After appellees moved for an order authorizing emergency use of the enacted state legislative plan, as modified to cure the Department's objection, the Arizona State Legislature passed on June 16, 1992, S.B. 1360, a legislative redistricting plan which attempted to cure the objection, while retaining the balance of the plan approved by the Department of Justice. On June 16, 1992, the Governor signed S.B. 1360, and it was submitted to the district court.

S.B. 1360 cured the three-way split of the Hispanic population in Santa Cruz County among districts 8, 9 and 11 by transferring the Hispanic precincts in Santa Cruz County which were in district 9 into district 8, thereby placing the Hispanic population in Santa Cruz in only two districts: 8 and 11. This increased the Hispanic percentage of the population in district 8 from 34.77% to 37.4%, while maintaining district 11 at 50.1%. (Jur. State. at 27a; Senate exh. 79). District 9, which had the lowest Hispanic population (16.3%) of the three districts, was proportionately reduced.

Significantly, neither during the hearing before the district court nor during the legislative hearings on S.B. 1360, did appellant **ever** present an alternative to cure the objection. Moreover, appellant's sister organization — the Hispanic Chamber of Commerce — which was also represented by the appellant's counsel in the district court, requested only the transfer of a single Hispanic precinct from district 9 to district 8, and S.B. 1360 implemented that transfer. (See June 15, 1992 hearing before House Judiciary Committee, p. 44-45).

(footnote continued)

that as a result, the district court has ordered a redistricting plan that "circumvents" Section 5. The court's congressional plan was immediately effective, not because of exigent circumstances, but because the plan was a court plan not subject to Section 5 in accordance with this Court's ruling in *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). See Appellee House's Motion to Affirm in Nos. 92-362, 92-375, at p. 28-29.

E. The District Court's Decision

On June 19, 1992, following a half-day hearing, the three-judge district court, in a unanimous 3-0 decision, authorized emergency interim use of S.B. 1360 for the 1992 state legislative primary and general elections, scheduled for September 8, and November 3, 1992, respectively. The court noted that the following pre-election deadlines necessary for the conduct of the September 8 primary elections were imminent and justified a finding of exigent circumstances for the following reasons:

- The last day for candidates to collect the requisite number of signatures to qualify for the ballot and to file their nomination petitions containing those signatures was June 25, 1992 (only six days away), A.R.S. §§ 16-311, 16-314, and the candidates needed to know the boundary lines of the districts for purposes of collecting the signatures of qualified voters from the district in which they were running.[4]
- The deadline for filing challenges to the nomination petitions was only five court days later, or July 2, 1992, A.R.S. § 16-351;
- The Arizona superior court had only ten days thereafter (until July 13, 1992) to both hear and render decisions on those challenges, *id.*;
- Any appeal from the superior court's decision had to be made within five days to the Arizona Supreme Court, *id.*, and its decision had to be rendered by July 31, 1992;
- Absentee balloting for the primary election was to begin in less than seven weeks on August 6, 1992, A.R.S. § 16-545, which required that the ballot pamphlets be printed by then;
- Thirty-three (33) days later, on September 8, 1992, the primary election was scheduled, and in fact, primary

[4] See also A.R.S. § 16-322A(3).

election voting actually began on August 6 when absentee balloting commenced;

- The general election was scheduled less than two months thereafter on November 3, a much shorter time than most states, limiting the time for campaigning. (Opinion at 3a).[5]

Under these circumstances, the district court found exigent circumstances by which to authorize S.B. 1360 and rejected the only available alternatives: (i) postponing the elections, (ii) using the 1982 districts, or (iii) running the State elections on an at-large basis. It rejected the option of using the old 1982 legislative districts on the grounds that, *inter alia*, they were now seriously malapportioned (Opinion at 4a) and therefore no longer constitutional. Moreover, Hispanic electoral opportunities were more limited under the 1982 legislative redistricting plan than S.B. 1360 which, *inter alia*, created an **additional** Hispanic population majority district (district 11) and increased the Hispanic population in district 20 from 18.5% to 28.2% Hispanic, in district 7 from 29.6% to 34.6%, and in district 8 from 34% to 37.4%. (*See* Senate Exh. 79 at S2031, S2053).

The court also rejected the option of delaying the state legislative elections until a permanent plan had been precleared. That would have simply prolonged the use of the less acceptable 1982 districts and entailed the expense of an additional election. The court concluded that that "would be unfair to Arizona voters, increase voter confusion and increase the cost of elections to the state." It would have also required a number of state legislators, who had announced that they no longer wished to serve, to continue to do so.[6] (Opinion at 4a).

Finally, the court rejected the option of ordering at-large elections for the 90 state legislators, given the large number of

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[5] The district court's opinion is found in the appendix to the appellant's Jurisdictional Statement. For convenience, references to the opinion will cite to the page in the Jurisdictional Statement's appendix as "Opinion at ___."

[6] In fact, 32 of the 90 legislators are not seeking reelection for a variety of reasons not relevant herein.

candidates for those 90 offices. (Opinion at 5a). Indeed, the size of such a ballot would be virtually unmanageable; the risk of voter confusion obvious.

The court found that S.B. 1360 was the superior alternative as it "reflects the state's policy and attempts to cure the objections raised by the Department of Justice" by eliminating the three-way division of the Hispanic population in Santa Cruz County:

> S.B. 1360 reflects the state's policy and attempts to cure the objections raised by the Department of Justice. By adjusting Hispanic Majority precincts from District 9 to District 8, the three way division of the Hispanic population in Santa Cruz County is eliminated. As a result, two districts are created. . . . While this Court makes no determination on the constitutionality of S.B. 1360, or the validity of S.B. 1360 under the Voting Rights Act, the Court does find that interim use of S.B. 1360 is warranted given the forthcoming election and Arizona's complicated provisions necessary for administering elections. [Citations omitted.]

(Opinion at 5a).

Significantly, the court implemented S.B. 1360 "only for the use of the 1992 state legislative elections" (Opinion at 7a); appellant errs when it claims that the court's plan "will remain in effect" if "the Arizona legislature does not act to redistrict within the decade." (Jur. State., p. 18).

F. The Department of Justice's August 12 Objection

Following the court's June 19 order — and therefore outside of the record for purposes of this appeal — the Department of Justice objected to S.B. 1360 on August 12, 1992. Appellant alleges that the court's plan was therefore "the subject of a second letter of objection" (Jur. State, p. 18), but, of course, (i) the August 12 letter was the first objection to the court-authorized plan, (ii) that subsequent objection is irrelevant to whether the court properly exercised its discretion based on the

facts known to it on June 19, and (iii) the August 12 letter did, in fact, subtly change the nature of the original objection.

Unlike the June 10 letter, which requested that Hispanic voters be divided between only two districts "*thereby* creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice" [emphasis added] (Jur. State., p. 23a), the August 12 letter contended that a district with "a minority population majority" should be formed:

> Analysis of the plan now under review reveals that while the state appears to have addressed the fragmentation of Hispanics in Santa Cruz County, the state only increases the Hispanic share of the population in proposed District 8 by less than three percentage points (from 34.7% to 37.4%). We are aware that following the objection, minority leaders urged the state to remedy the noted fragmentation and create an additional district in southern Arizona in which minorities would comprise a majority of the population. We are also aware that there were alternative plans for this area of the state available to the legislature that would both cure the noted fragmentation and afford minorities an opportunity to elect candidates of their choice by incorporating those Hispanic areas into another district *which has a minority population majority*. [Emphasis added.]

(August 12, 1992 letter, set forth in Jur. State. at p. 27a)[7]

The only "alternative" plan of which appellees are aware that would have created a district with a Hispanic population *majority* in district 8 was submitted to the Legislature on

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[7] Thus, appellant is incorrect to argue that the August 12 letter "again cited the state's failure to create another district in southern Arizona that was majority minority." (Jur. State., p. 7). The June 10 letter never requested a "majority" minority district, only one that gave Hispanics the "potential" to elect a representative. A 37% Hispanic population in district 8 presumably does provide that potential since district 8, as a 34% Hispanic district, already was electing a Hispanic representative. (Senate exh. 79, p. S2053).

July 20 — only **after** the court hearing and **after** the Legislature adjourned on July 1. That plan (which is outside the record) was incomplete (it only drew 10 of Arizona's 30 senate districts) and created a Hispanic majority population district in district 8 only at the expense of reducing district 11 from a Hispanic majority district to a 45% Hispanic district.[8]

G. Appellant's Appeal

Appellant filed its Notice of Appeal on July 15, 1992 — nearly 30 days after the court's June 19 order. Its Jurisdictional Statement was not filed until around September 14, 1992, nearly two months later. The other Hispanic parties to this action have not joined in this appeal by the Hispanic Community Forum.[9]

Appellant states that following its appeal it filed an emergency motion for an injunction with the district court on August 19, 1992, seeking to enjoin the use of S.B. 1360. (Jur. State., p. 7). It complains that the district court "refused to set a hearing . . . and denied the motion on September 9, 1992, stating that appellant's appeal had deprived it of jurisdiction. In fact, the district court did not "refuse" to set a hearing; appellant failed to request oral argument at the time it filed its motion, as required under Rule 11(f) of the Rules of Practice of the U.S. District Court for the District of Arizona.[10] In any event, appellant does

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[8] Two other "alternatives" — only introduced on February 19, on the eve of the passage of the original legislative redistricting plan on February 20, 1992 — did not even create a Hispanic majority district in district 8, were incomplete (one plan only drew district 8), and had the effect of reducing the Hispanic percentage in district 11, among other things.

[9] The other Hispanic parties to this proceeding are the Hispanic Chamber of Commerce, Edward Valenzuela, Richard Zazueta, and Valerie Ann Vidal (all of whom were represented by appellant's counsel in the court below) and Congressman Ed Pastor.

[10] On or about August 27, the Hispanic Forum called the court to schedule a hearing, but it still had not filed the required request for a hearing. In light of the motion's jurisdictional defect, the court concluded that a hearing was unnecessary. See district court's Memorandum of Decision and Order, filed on September 9, 1992, p. 2 n. 2.

not appeal from that order here; thus, appellant's complaint is not relevant to this appeal.

REASONS FOR SUMMARY AFFIRMANCE

With the deadline for candidate nomination petitions only six days away, the district court ordered into effect, on an emergency interim basis, a state legislative redistricting plan for the 1992 primary and general elections. The only alternative districts proposed to the court were the unconstitutional, seriously malapportioned districts drawn a decade ago which undeniably offered less minority electoral opportunities than the districts authorized by the court.

Although appellant contends that the court below could not authorize interim use of unprecleared districts, a long line of cases (and Department of Justice regulations) authorize federal courts to exercise their equitable power to order interim redistricting plans, even where they do not fully comply with the law, where exigent circumstances exist. There is thus no substantial legal question that warrants plenary review.

Moreover, the facts of this case demonstrate that the district court properly exercised its discretion under the foregoing proposition of law in ordering emergency interim use of S.B. 1360, although it had not yet been precleared, for the following reasons:

- Exigent circumstances existed, given that candidates needed to know the boundaries of the districts in which they were running, and the deadline for filing nomination petitions, containing the requisite number of signatures of voters in the district to qualify the candidate to run in the district, was only six days away.
- The court-authorized plan was undeniably superior to the 1982 districts, as it provided for substantially equally populated districts and enhanced minority electoral opportunities compared to the old districts.
- The U.S. Department of Justice acknowledged that the plan satisfied the requirements of Section 5 "in large

part," and the plan attempted to cure the one objection previously interposed by the Department of Justice.

- Appellant never submitted to the court an alternative to cure the objection.
- The court only authorized the use of these districts for the 1992 elections.

Under these circumstances, the district court's order should be summarily affirmed. Appellant's position that even under exigent circumstances, a federal court has no power to order an interim plan before it has been precleared, particularly where it is the most lawful alternative before the court, is contrary to the law and common sense.

NO SUBSTANTIAL QUESTION EXISTS AS TO THE DISTRICT COURT'S POWER TO ORDER EMERGENCY INTERIM USE OF S.B. 1360

A. Where Exigent Circumstances Exist, It Is Well Settled That A Federal Court Can Authorize, On An Interim Basis, Districts Which Are Not Fully Lawful.

On numerous occasions, this Court has ruled that "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress," a court may authorize the use of districts, on an interim basis, which do not comply with all legal requirements, even constitutional requirements. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *Upham v. Seamon*, 456 U.S. 37, 44 (1982); *Connor v. Williams*, 404 U.S. 549, 550 (1972); *Mahon v. Howell*, 410 U.S. 315, 332, *modified*, 411 U.S. 922 (1973); *Clark v. Roemer*, 111 S.Ct. 2096, 2102 (1991).

In *Reynolds v. Sims*, 377 U.S. at 585, this Court stated the general rule that under exigent circumstances, federal courts may authorize the use of legislative apportionment plans that do not fully measure up to all legal standards:

> However, under certain circumstances, such as where an impending election is imminent and a State's

> election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.

Reynolds v. Sims, 377 U.S. at 585.

In *Reynolds*, 377 U.S. at 586, despite the unconstitutionality of Alabama's legislative districts, this Court commended the district court for acting "wisely in declining to stay the impending primary election in Alabama" (which was scheduled to be held two months after plaintiff brought a motion for a preliminary injunction, *id.* at 586), and from "properly refrain[ing] from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme," adding:

> And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. Additionally, the court below acted with proper judicial restraint, after the Alabama Legislature had failed to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect. *Id.* at 586.

In this case, the district court followed these legal principles by deferring to the legislature's effort to cure the objection raised by the Department of Justice on June 10 and in determining that that plan "attempts to address the overall objections raised by

the Department of Justice" (Opinion at 6a) such that it was appropriate for interim use.

In *Upham v. Seamon*, *supra*, 456 U.S. at 44, this Court again reiterated the federal courts' authority to permit elections to be held in districts which do not fully comport with the law:

> It is true that we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. [Citations omitted]. Necessity has been the motivating factor in these situations.

Upham v. Seamon, 456 U.S. at 44.

Moreover, the Department of Justice's own regulations for the administration of Section 5 of the Voting Rights Act expressly recognize that a federal court may authorize the "emergency interim use without preclearance" of a voting change. Section 51.18(c) provides:

> (c) *In emergencies.* A Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of the practice not explicitly authorized by the court. 28 C.F.R. § 51.18(c).

The lower courts have specifically recognized the federal courts' authority to order interim use of plans that have not been precleared. In *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex.), *stay den.*, 456 U.S. 902 (1982), the district court ordered into effect a temporary redistricting plan for the 1982 elections, although portions of the plan had been subject to objection by the Department of Justice under Section 5 of the Voting Rights Act. There, various plaintiffs had filed suits in various federal courts challenging the state legislature's redistricting plans. Following the trial, the Department of Justice issued letters of objection under Section 5 of the Voting Rights Act — three months before the May 1 primaries and six days before the February 1 filing deadline for those primaries. The district court adopted a temporary plan which modified, to some extent, the

challenged legislative districts but nonetheless retained portions to which the Department of Justice had objected under Section 5. The court concluded:

> Also in an emergency, a district court may adopt as an interim measure a redistricting plan that otherwise may not comply with the stringent requirements for a permanent court ordered plan. [citations omitted] . . . We think that the same principle should be applicable to a plan as to which a Section 5 objection has been raised: in emergencies, a court should be permitted to proceed on the basis of such a plan or portions of such a plan if that is the only fair and equitable alternative to disruption of the election process. [citation omitted]

Terrazas v. Clements, 537 F. Supp. at 538.[11]

Again, in *Campos v. City of Houston*, 968 F.2d 446 (5th Cir. 1992), the Fifth Circuit ruled that "elections may be held under exigent circumstances under a plan to which the Attorney General has objected." However, in that case, the Fifth Circuit determined that where the district court "rejects, without adequate reasons, a precleared plan in favor of a legislative plan that has not been precleared, it abuses its discretion in awarding interim relief." *Id.* at 452. In *Campos*, the district court had authorized the upcoming elections to be conducted under a redistricting plan to which the Attorney General had timely objected, instead of a newly enacted plan which the Attorney General had precleared just prior to the issuance of the district court's order.

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[11] Appellant attempts to distinguish *Terrazas v. Clements*, 537 F. Supp. 514, on the grounds that (i) the district court there faced a primary election within seven weeks, (ii) the court had already extended the deadlines for filing candidate statements, and (iii) the court had offered the parties the opportunity to present plans in evidence and had invited the Department of Justice to participate. (Jur. State., pp. 13-14 n. 6). None of these points distinguishes *Terrazas*. In this case, the Department of Justice had declined to take a position at the hearing; the appellant did not submit any alternative plans to the court to cure the objection, although it was free to do so; and although the primary election was eleven weeks away, the voting for the primary election was to begin in less than seven weeks with the commencement of absentee balloting, and further, the filing deadlines were only six days away.

Since the district court's main reason for authorizing the unprecleared plan was legally insufficient — that Hispanic citizens had objected to the precleared plan — the Fifth Circuit vacated the order as an abuse of discretion.

In this case, there was no precleared plan. The district court's choice was between continued use of the existing unconstitutional districts or authorization of a newly enacted, properly apportioned set which was largely precleared and which attempted to cure the portion that was not.

Nor are any of the cases cited by appellant contrary to the uniform line of authorities cited above. Appellant cites *Clark v. Roemer*, 111 S.Ct. 2096 (1991), for the proposition that Section 5 is "the one clear constraint of [sic] the remedial powers of a district court" (Jur. State., p. 11), apparently arguing that a court has no power to authorize, on an interim basis, a plan that has not been precleared. (Jur. State., p. 15).

To the contrary, *Clark v. Roemer*, 111 S.Ct. 2096, did not address the federal court's remedial powers to order interim districts in exigent circumstances. Instead, that case arose in the context of a standard action to enjoin elections held pursuant to an enactment for which the State had failed to obtain approval under Section 5 of the Voting Rights Act. Even in that context, this Court expressly *declined* to rule that federal courts do not have the power to authorize elections for unprecleared districts:

> We need not decide today whether there are cases in which a District Court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed.

Clark v. Roemer, 111 S.Ct. at 2102.

Unlike this case, *Clark* was a case where the State had not timely sought preclearance, and the appellants sought to enjoin elections which the State was administering in violation of Section 5. In *Clark*, the appellants had alleged back in July, 1987 that

Louisiana had violated Section 5 of the Voting Rights Act by failing to submit for preclearance a number of statutory and constitutional voting changes for the election of judges. Although in September, 1988 and May, 1989, the Attorney General had objected to certain changes which were submitted to him, Louisiana waited for well over a year before asking the Attorney General in June, 1990 to reconsider his denial of preclearance and proceeded with plans to hold elections for the unprecleared seats in the fall of 1990. Under these circumstances, this Court determined that the district court had erred in permitting the elections for the unprecleared seats to go forward:

> No such exigency exists here. The State of Louisiana failed to preclear these judgeships as required by § 5. It received official notice of the defect in July 1987, and yet three years later it had still failed to file for judicial preclearance . . . . [citation omitted] It scheduled elections for the unprecleared seats in the fall of 1990 even after the Attorney General had interposed objections under § 5. In short, by the fall 1990 election, Louisiana had with consistency ignored the mandate of § 5. The District Court should have enjoined the elections.

Clark v. Roemer, 111 S.Ct. at 2102.

In contrast, in this case, Arizona timely sought preclearance. The Department of Justice's objection came only 15 days before the candidate filing deadline and 82 days after Arizona's original preclearance submission, for which, by the way, expedited consideration had been requested. When the Department found the plan largely satisfied Section 5, but objected to one portion, the Arizona Legislature attempted to cure the objection in the first instance, and the court properly deferred to that effort after finding that it eliminated the three-way division of the Hispanic population to which the Department had objected. Accordingly, the record reflected that unlike the State of Louisiana, Arizona did not simply attempt to enforce new districts without preclearance, but had requested judicial authorization for interim districts, that the court had

authorized districts approved by the Department of Justice while modifying the area to which objection was made, and that appellant had failed to offer any alternative modification. Unlike the situation in *Clark* where the issue was whether an election could proceed under districts the state has failed to preclear, a court's authorization of interim districts following a hearing protects the interests that the Voting Rights Act seeks to safeguard.

Appellant also cites three cases for the proposition that "[t]his Court and individual Justices have held that elections should not go forward pursuant to unprecleared voting changes, and have granted injunctions to prevent such elections." (Jur. State., p. 17). However, none of those cases concerned the power of a federal court to authorize the emergency use of interim districts; instead, they simply concerned applications to enjoin a state's unauthorized use of unprecleared districts in violation of Section 5 of the Voting Rights Act. In *Lucas v. Townsend*, 486 U.S. 1301 (1988), Justice Kennedy granted an application to enjoin a bond referendum election where a change in the election date (from a high turnout election date to a special election) had not been timely submitted for preclearance and preclearance had not been received prior to the election. In balancing the equities, Justice Kennedy concluded that there was a fair prospect that the lower court erred in concluding that the change in date was not covered by Section 5 and that on balance, the equities favored the applicants because any burdens imposed by the injunction "can fairly be ascribed to the respondents' own failure to seek preclearance sufficiently in advance of the date chosen for the election." *Id.* at 1305.

Again, in *Canady v. Lumberton City Board of Education*, 454 U.S. 957 (1981), the Court granted an application to enjoin the Board of Education and the Board of Elections from permitting residents of three annexed areas to vote in a school board election until appellees demonstrated that they had complied with Section 5.

Finally, in *Holt v. City of Richmond*, 406 U.S. 903 (1972), the Court granted an application to enjoin elections for the city council of the City of Richmond where an objection to the voting

changes under which they would be conducted had been interposed by the Attorney General.

Accordingly, none of these cases addressed the power of a district court to authorize interim districts; they simply addressed the right to enjoin a political subdivision's unauthorized use of unprecleared districts, which is precisely what Section 5 of the Voting Rights Act is meant to prohibit.[12]

Therefore, none of those cases are relevant to a federal court's power to order the interim use of unprecleared districts in the case of exigent circumstances. As shown herein, it is well settled that the courts have this power in the case of exigent circumstances. No substantial legal question is raised herein.

B. No Substantial Question Exists As To The Presence of Exigent Circumstances.

Owing to the "upcoming elections and the complicated administrative procedures involved in Arizona's elections," the court below found that "exigent circumstances" existed which justified the interim use of S.B. 1360 for the 1992 state legislative elections. (Opinion at 2a).

This finding was amply justified in the record, as demonstrated in the court's opinion. First, the last day for candidates to file nomination petitions containing sufficient signatures to qualify for the ballot was only six days away on June 25, 1992. *See* A.R.S. Sections 16-311, 16-314. (Opinion at 3a).

Second, there was only a limited time thereafter to allow challenges to nomination petitions and to resolve those challenges: The deadline for filing challenges to candidate nomination petitions was only five court days away (or by July 2, 1992), *see* A.R.S. Section 16-351; the superior court only had ten days thereafter, or until July 13, to hear *and* render decisions on the petition challenges, *see id.*; a party only had five days thereafter

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[12] Appellant also cites several cases for the proposition that the Court "has repeatedly reversed three-judge courts that have failed to properly apply or to comply with the mandates of Section 5. . . ." (Jur. State., p. 17). That, of course, proves nothing more than where a lower court errs, this Court will reverse.

within which to file a notice of appeal to the State Supreme Court, whose opinion had to be rendered by July 31, *id.*; and within six days, or by August 6, 1992, absentee balloting had to begin, *see* A.R.S. Section 16-545, which meant that the ballots had to be printed and available for absentee voting by August 6, 1992. With significant numbers of Arizona voters stationed overseas with the military, the 33-day period for absentee balloting could not have been reduced materially without disenfranchising voters, and by law, the absentee and regular ballots must be identical. A.R.S. Section 16-545(A). (*See* Opinion at 3a).

While acknowledging that exigent circumstances have been determined to exist when candidate filing periods have passed (Jur. State., p. 13 n. 5), appellant argues that the court "fabricated" an emergency because the primary elections were three months away (actually they were only 11 weeks away). (Jur. State., p. 13). However, as noted, the deadline for gathering signatures for candidates' nomination petitions ran in six days, little different from the situation in *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), where the Department of Justice had objected to the districts only six days before the filing deadline for the May 1 primaries (which were 3 months away). Further, postponement of the deadline for candidate nomination petitions would have seriously truncated the period for campaigning for the September 8 primary elections, a result which would have benefited incumbents as against challengers (including minorities) who do not have the advantages of name recognition for purposes of fund raising and voter support. Additionally, postponing the deadline would have further reduced the 33 days available for absentee balloting, thereby disenfranchising some voters.

Appellant also argues that the "court did not consider as an option the moving of some election law deadlines to allow the state to seek preclearance review of S.B. 1360" (Jur. State., pp. 9-10); however, postponement of election law deadlines meant postponing the state legislative elections. Specifically, by the time the Department of Justice had assessed whether S.B. 1360 satisfied Section 5 (in this case August 12), it would have been too late to hold the September 8 primary elections — less

than 30 days later — under any other plan. Indeed, absentee voting would have already begun. Even if an adverse preclearance decision had been made a month earlier, there would have been insufficient time prior to the primary election to redraw new districts *and* allow time for candidates to collect signatures from the new districts before absentee balloting. Moreover, separating the state legislative elections from the federal elections, including the Presidential election, would have affected voter turnout for the state legislative elections, which could have adversely affected minority voters. *Cf. Lucas v. Townsend*, 486 U.S. 1301 (1988). In sum, awaiting preclearance was not practicable if the elections were to be held on schedule.

C. The Interim Districts Authorized By The District Court Largely Satisfied Section 5 And Attempted To Cure The Objection That Had Been Interposed.

Nor did the district court abuse its discretion in adopting S.B. 1360. S.B. 1360, from the standpoint of equality of population and minority electoral opportunities, was indisputably superior to the existing, concededly unconstitutional, decade-old districts. Moreover, the districts authorized by the court appeared to satisfy Section 5 concerns while at the same time reflecting state legislative policy: The Department of Justice's June 10, 1992 letter acknowledged that the redistricting plan met "in large part" Section 5 preclearance requirements (Jur. State. at 23a), and the court found that it eliminated the three-way division of the Hispanic population in Santa Cruz County about which the Department of Justice complained. (Opinion at 5a).

Although appellant contends that S.B. 1360 did not cure the objections, appellant never presented the court with a proposal to cure it.

Further, prior to the court hearing, at the legislative hearing held on June 15, 1992, at which the Legislature considered a cure for the Department of Justice's objection, the appellant's representative stated that he was "not free to give" any alternative that appellant had in mind with respect to Santa Cruz County. (6/15/92 Transcript of House Committee on Judiciary, p. 42-43). Its sister Hispanic organization, also represented by appellant's

counsel in the court below — the Arizona Hispanic Chamber of Commerce — requested only that precinct 13 in Santa Cruz County be moved from district 9 to district 8, that being the "biggest thing and the single shot" that it wished to emphasize, and that transfer was in fact implemented under S.B. 1360. *Id.* at 45.

Appellant argues that "the plan produced by the Arizona legislature completely disregarded the Department of Justice's conjunctive and substantive objection to the state's failure to create an additional district with the population in that southern part of the state where Hispanic voters would have potential to elect representatives of their choice . . . ." (Jur. State., p. 12). To the contrary, S.B. 1360 directly addressed the objection. The Department of Justice's only objection on June 10 was that the submitted plan "divides among three legislative districts" the Hispanic population in Santa Cruz County and that alternative plans "more fairly recognize this concentration of Hispanic voters by dividing them between two districts, thereby creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice." (Jur. State. at 23a). That is exactly what S.B. 1360 did. It eliminated the three-way split of the Hispanic population in Santa Cruz County between districts 8, 9, and 11 by transferring the only Hispanic precincts in the county that were in district 9 to district 8; it retained district 11 as a majority Hispanic district; and it increased the Hispanic population in district 8 from 34.7% to 37.4%, by eliminating the three-way split. The Hispanic population in district 8 is at least equal to that in other state legislative districts which have elected Hispanic representatives, such as district 7 (which has elected a Hispanic senator and two Hispanic representatives with a Hispanic population of 30%), district 2 (which elected a Hispanic senator throughout the decade of the 1980's until his voluntary retirement in 1990 with a 10% Hispanic population), and district 4 (which elected a Hispanic legislator from 1973 through 1987 with only a Hispanic population of 18%). (*See* Senate Exhibit 79).

Moreover, district 8 itself has elected a Hispanic legislator at a 34% Hispanic population level. (*Id.*)[13]

Appellant also claims that the court below failed to "consider ordering its own plan or a modified party plan into effect, with corrections of Section 5 violations, as a court ordered plan . . . ." (Jur. State., p. 10). However, as appellant acknowledges elsewhere (Jur. State., p. 15), a district court must honor the policies and preferences of the state as reflected in its enacted redistricting legislation, except where "necessary to cure any constitutional or statutory defect." *Upham v. Seamon*, 456 U.S. 37, 43 (1982); *White v. Weiser*, 412 U.S. 783, 795-797 (1973). The district court did just that by adopting a plan which maintained the enacted districts that satisfied Section 5 and which attempted to cure the Section 5 objection.

Accordingly, appellant's contention that "the district court facilitated the state's goal of avoiding more than the least possible change to its incumbent driven plan" (Jur. State., p. 10) has absolutely no basis in the record: The district court was obligated to follow all lawful portions of the State's plan. It did. It further adopted a plan that attempted to cure the Department of Justice's objection, and appellant failed to present any alternative cure.

CONCLUSION

For all these reasons, appellees submit that none of the issues raised by appellant merits plenary review by this Court. Appellant's position that the district court had no authority to authorize emergency interim use of unprecleared districts is contrary to a uniform line of cases and the Department of Justice's own regulations. Moreover, the facts of this case demonstrate that the legislative districts authorized by the district court were superior to the alternatives presented to it, that they largely met

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[13] Accordingly, appellant's contention that "the State never intended to respond to the Department of Justice's objection" has no basis whatsoever in the record. The State Legislature held hearings to cure the objection, and appellant never presented any alternative to it during those hearings.

the requirements of Section 5 and attempted to cure the one Section 5 objection that was interposed, and that appellant never presented an alternative to cure the objection. The district court's judgment should be summarily affirmed.

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Respectfully submitted,

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